IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

WP(C).No. 26813 of 2007(P)

OS.534/2001 of SUB COURT, THRISSUR
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PETITIONERS:
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1. PRAKASAN, S/O.PALLOMPARAMBATH KUTTIPARAMBIL SUBRAMANIAN, VALLACHIRA DESOM, THRISSUR TALUK.

2. C.M.SUDHADEVI, W/O.PALLOMPARAMBATH KUTTIPARAMBIL PRAKASAN, VALLACHIRA DESOM, THRISSUR TALUK.

BY ADV. SRI.N.P.SAMUEL

RESPONDENT:

THE CATHOLIC SYRIAN BANK LTD., PUCHUNNIPADAM BRANCH, REPRESENTED BY THE BRANCH MANAGER, PUCHUNNIPADAM, THRISSUR DISTRICT.

BY ADV. SRI.B.S.KRISHNAN SC C.S.BANK
SRI.K.ANAND (A.201)
SMT.LATHA KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Appendix

Petitioners' Exts:

Ext.P1 true copy of judgment in OS 534/2001 of the 1st Addl. Sub Court, Thrissur dtd. 11.10.04.

Ext.P2 photo copy of decree in OS 534/2001 of the 1st Addl. Sub Court, Thrissur.

Ext.P3 photo copy of execution petition, E.P. 497/05 in OS 534/01 of the Sub Court, Thrissur dtd. 18.10.2005.

Ext.P4 Photo copy of draft sale proclamation filed by respondent in EP 497/05 in OS 534/01 of the Sub Court, Thrissur dtd. 18.10.2005.

Ext.P5 photo copy of objection filed by petitioners in draft sale proclamation in EP 497/05 in OS 534/01 of the Sub Court, Thrissur. dtd. 20.2.06.

M.N.Krishnan, J.

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W.P(C).No.26813 of 2007

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Dated this the 12th day of November, 2007.

JUDGMENT

This Writ Petition is filed seeking a direction to quash the order dated 30.7.2007 and direct the Executing Court to order sale of 10 cents of property alone for recovery of the amount. Learned counsel for the writ petitioners submits that sale of a portion of the property will be sufficient to satisfy the decree debt and therefore the order of the court below to sell two items of property cannot be sustained.

2. There is no dispute that the property sought to be sold in auction is the mortgaged property. This Court in the decision reported in **Dhanalakshmi Bank Ltd.** v. **Divakaran** - 2000(2) K.L.T. 231 held thus:

> "What is to be noted here is that it is given to the Court passing the preliminary decree for sale, to order either the sale of the whole of the mortgaged property or the sale of sufficient part of the

> mortgaged property. Once this power of directing sale either of the whole or of the portion is exercised by the Court which passes the decree, it is clear that the executing court has no power to go behind that direction in the decree and to alter either the mode of sale ordered or to consider whether anything less than what is directed by the decree to be sold, need alone be sold."

So by virtue of the principles laid down by the Division Bench, until and unless the court which passes the preliminary decree has carved out a portion of the property then the Executing Court cannot carve out a portion of the property and sell the same.

3. Learned counsel for the writ petitioners has drawn my attention to the decision of the Apex Court reported in **S.Mariyappa** v. **Siddappa** - (2005) 10 S.C.C. 235. A perusal of the said decision would reveal that it was not related to sale of a property which was mortgaged. It was the sale of the property which included in a prior mortgage. So the question of sale of a portion of the property which is mortgaged did not arise for consideration before the Apex Court. Learned counsel for the writ petitioner had also drawn my attention Order 21 Rule 83 of

C.P.C. where the court prescribes postponement of sale to enable the judgment debtor to raise amount of decree. But Order 21 Sub-rule (3) of Rule 83 of C.P.C. makes it clear that when the property sought to be sold is a mortgaged property or a charged property Order 21 Rule 83 (1) of C.P.C. cannot be operative. So, the law has treated mortgaged property altogether on a different footing from the non-mortgaged property which is brought to sale in execution of the decree.

4. In the light of the Division Bench decision of this Court the prayer for selling a portion of the property cannot be entertained by this Court and therefore the Writ Petition is dismissed. The writ petitioner is free to move before the court below for granting them some time to make payment, so as to save the property. The court shall consider that request sympathetically and the Bank must also co-operate in giving some breathing time to the judgment debtors to wipe off the liability.

M.N.Krishnan,
Judge.

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